

TENTATIVE RULINGS

FOR: March 18, 2014

Please note that the court will strictly enforce filing deadlines for papers filed in support of and in opposition to law and motion matters, and may exercise its discretion to disregard a late filed paper, pursuant to California Rules of Court, rule 3.1300(d).

When calculating filing deadlines for papers to be filed within a certain number of court days from a hearing date, parties should exclude court holidays and court closure days.

Court Reporting Services - As a result of statewide budget reductions, official court reporters are no longer provided by the Court in proceedings for which such services are not legally mandated. These proceedings include civil law and motion matters. If counsel wish to have the hearing on their civil law and motion matter reported, they have two options:

- Elect to use the services of a private local court reporter that the Napa County Bar Association has arranged to be present for the duration of all scheduled law and motion hearing calendars. There is a fee paid by the party directly to the court reporter for this service, and arrangements for payment can be made on the day of the hearing. For further information about the Bar Association program including fees, [click here](http://napacountybar.org/court_reporting.php) (http://napacountybar.org/court_reporting.php)
- Arrange for a private court reporter of their choosing to be present.

Attorneys or parties should confer with each other to avoid having more than one court reporter present for the same matter.

CIVIL LAW & MOTION – Hon. Rodney Stone, Dept. A (Historic Courthouse)

Edgar Beard, Jr., etc. v. Linda Beard

26-62731

**MOTION OF DEFENDANT LINDA BEARD TO SET ASIDE DEFAULT
JUDGMENT**

PLAINTIFF’S REQUEST FOR JUDICIAL NOTICE

TENTATIVE RULING: Plaintiff’s unopposed request for judicial notice is GRANTED. The court takes judicial notice of the item identified in the request but not the truth of any of the matters contained therein.

The motion to set aside the default judgment is DENIED, without prejudice. The motion is accompanied by the answer or other pleading required by Code of Civil Procedure section 473, subdivision (b), but defendant only requests relief from the default judgment. Granting that request would be a fruitless act because the underlying default would remain and plaintiff could reenter judgment at any time. The court cannot grant relief that exceed the issues litigated. (See. e.g., *Wallace v. Otis* (1941) 47 Cal.App.2d 814, 815.)

People of the State of California v. \$23,800 U.S. Currency

26-63297

PLAINTIFF'S MOTION TO STRIKE CLAIM

TENTATIVE RULING: Plaintiff's unopposed Motion is granted. Claimant did not file his claim within 30 days, as required by Health & Safety Code section 11488.5, subdivision (a)(1).

PROBATE CALENDAR – Hon. Diane Price, Dept. B (Historic Courthouse)

Conservatorship of Kachuck

26-60704

REVIEW HEARING

TENTATIVE RULING: After a review of the matter, the court finds the conservator is acting in the best interest of the conservatee. Thus, the case is set for a biennial review hearing in two years, on March 17, 2016. The court investigator shall prepare a biennial investigator report for the next hearing date. The clerk is directed to send notice to the parties.

Estate of van der Werf

26-63566

PETITION FOR PROBATE OF WILL AND FOR LETTERS TESTAMENTARY

TENTATIVE RULING: There is no proof of publication on file. If a proper proof of publication is filed prior to the hearing, the petition shall be GRANTED. Otherwise, the petition shall be DENIED, without prejudice.

CIVIL LAW & MOTION – Hon. Diane Price, Dept. B (Historic Courthouse)

DEMURRERS OF DEFENDANTS BANK OF NEW YORK, ETC., CWMBS, INC., BANK OF AMERICA, N.A., ETC., AND MORTGAGE ELECTRONIC SYSTEMS, INC., TO THE COMPLAINT

TENTATIVE RULING: Defendants’ demurrers to the amended complaint are SUSTAINED.

As in her original complaint, plaintiff alleges the assignment of the endorsed note and deed of trust securing her mortgage loan to defendant securitization trust was invalid because it was recorded after the January 26, 2006 closing date of the trust. She alleges that, as a result, the current servicer and agent of the trust (defendant Bank of America) and the other defendants have no authority or standing to collect payments from plaintiff, negotiate a loan modification or exercise the power of sale under the DOT. (Complaint, paragraphs 11-14.) Plaintiff pleads that she “does not claim any standing to or interest in challenging the securitization process.” Instead, she “seeks to document the sales of her promissory note and to identify the rightful current holder of [her] note with rights to provide a loan modification and to collect payments due under the note and to show the modifications that were made to [her] original contract by third parties that affected her rights under the original deed of trust.” (Paragraph 19.) Plaintiff pleads that a recent 5th District case, *Glaski v. Bank of America* (2013) 218 Cal.App.4th 1079, gives her the right to challenge defendants’ ownership of her note, their right to collect payments from her and their standing to foreclose. The complaint contains 10 causes of action - declaratory relief, slander of title, fraud, breach of contract, “quasi contract and unjust enrichment,” quiet title, accounting, violation of California’s Homeowners’ Bill of Rights and violation of Business & Professions Code section 17200. Although plaintiff frequently mentions foreclosure, she does not plead that foreclosure is threatened or imminent. She states she is merely acting “preemptively.” (Paragraph 48.)

The court first notes that the *Glaski* decision has been frequently criticized and distinguished and it has not been followed on the standing issue by any state appellate court in California. (See discussion in *Haddad v. Bank of Am., N.A.*, 2014 U.S. Dist. LEXIS 2205 ((S.D. Cal. Jan. 8, 2014).) In *Glaski* the Fifth District Court of Appeal determined, “under New York trust law, a transfer of a deed of trust in contravention of the trust documents is ‘void, not merely voidable,’ and, under California law, ‘a borrower can challenge an assignment of his or her note and deed of trust if the defect asserted would void the assignment.’” (*Id.*, at p. 1095.) The court held that the plaintiff had standing to state a claim for quiet title, declaratory relief and unfair business practices under Business and Professions Code section 17000. (*Id.*, at pp. 1100-1101.)

Division Three of the Fourth Appellate District reached an opposite conclusion on the issue of standing in *Jenkins v. JP Morgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497. That court determined that a person in plaintiff’s position, “an unrelated third party to the alleged securitization, and any other subsequent transfers of the beneficial interest under the promissory note,” lacks standing to challenge any such securitization or transfer. (*Id.*, at p. 511.) The court concluded that “even if any subsequent transfers of the promissory note were invalid, Jenkins is not the victim of such invalid transfers

because her obligations under the note remained unchanged.” (*Id.*, at p. 515.) Because each cause of action in the amended complaint is predicated on the allegedly invalid and/or unlawful assignments and transfers mentioned above, the amended complaint fails to state a cause of action. (See also *Rossberg v. Bank of America, N.A.* (2013) 219 Cal.App.4th 1481, 1498.)

Some of the causes of action fail for other reasons as well. First, as mentioned above, plaintiff has not stated a cause of action for declaratory relief because plaintiff’s legal support for that claim is based largely on the *Glaski* decision. The claim for slander of title fails because the express language of plaintiff’s deed of trust gives MERS the authority to assign it to others. (*Herrera v. Federal National Mortgage Association* (2012) 205 Cal.App.4th 1495, 1498.) The third cause of action for fraud fails because plaintiff does not plead an actionable misrepresentation or concealment, or facts showing her detrimental reliance on the alleged misrepresentation or concealment. She also fails to plead the alleged fraud with the required particularity. (See *Hills Transp. Co. v. Southwest Forest Industries, Inc.* (1968) 266 Cal.App.2d 702, 707-708.)

Plaintiff pleads defendants breached the mortgage contract by failing to disclose that the loan had been presold and that defendants could later restrict her ability to obtain a modification of her loan. (Complaint, paragraph 90.) But those allegations, even if true, do not establish any breach of plaintiff’s mortgage contract. An assignment of a note and deed of trust is merely a transfer of an interest. (*Fontenot v. Wells Fargo Bank, N.A.* (2012) 198 Cal.App.4th 256, 273.) It is not a breach of contract unless the contract prohibits assignment, and plaintiff fails to plead that her contract does prohibit assignments. Because the cause of action for quasi contract and unjust enrichment depends upon the breach of contract cause of action, it too fails.

The cause of action for quiet title fails because plaintiff fails to plead that she has or is able to tender the amount of the debt. (*Aguilar v. Bocci* (1974) 39 Cal.App.3d 475, 477.) Further, there is no independent cause of action for an accounting. (*Batt v. City and County of San Francisco* (2007) 155 Cal.App.4th 65, 82 [overruled on other grounds by *McWilliams v. City of Long Beach* (2013) 56 Cal.4th 613, 626].) Next, the cause of action to cancel instruments does not plead an offer to tender the debt or return the property. (See *Aguilar v. Bocci, supra*, 39 Cal.App.3d at p. 477.) The cause of action for violation of California’s Homeowners’ Bill of Rights fails to allege that defendants have commenced foreclosure proceedings. (See Civil Code section 2924.6.) Finally, plaintiff has not pleaded a violation of Business & Professions Code section 17200 because she has not pleaded facts establishing a violation of some law other than the Unfair Competition Act. (*Krantz v. Bt Visual Images, Inc.* (2001) 89 Cal.App.4th 164, 178.)

The amended complaint appears to contain only two minor amendments that do not address the many defects identified in this court’s January 22, 2014 order sustaining defendants’ demurrers to the original complaint. The court therefore concludes that the pleading cannot be further amended. Because the amended complaint and its ten individual causes of action do not state a claim for relief, defendants’ demurrers are SUSTAINED without leave to amend.

MOTION TO BE RELIEVED AS COUNSEL – CIVIL

APPEARANCE REQUIRED